

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

METROKANE, INC.,
Plaintiff,

vs.

HOUDINI, INC.,
Defendants.

Case No. 08-CV-5841 (NRB)
ECF Case

**DECLARATION OF EDWARD R. SCHWARTZ IN SUPPORT
OF HOUDINI, INC.'S MOTION TO STAY OR TRANSFER**

Edward R. Schwartz states:

1. I represent Houdini, Inc. ("Houdini") in trademark litigation matters. I make this declaration based on personal knowledge and could competently testify to the facts stated herein if called upon to do so.

2. In July 2005, Houdini commenced a proceeding before the Trademark Trial and Appeal Board ("TTAB") of the United States Patent and Trademark Office to cancel a registration for the trademark HOUDINI for corkscrews which had been issued to Metrokane, Inc. ("Metrokane"). The ultimate issue in that proceeding was whether Metrokane was entitled to a registration for HOUDINI, not whether either party was entitled to continue to use the mark.

3. The main fact issues in the cancellation proceeding before the TTAB were which party had priority of use of the HOUDINI trademark and whether there was a likelihood of confusion caused by Metrokane's use of the mark vis-à-vis Houdini's use of the mark. Metrokane also asserted that Houdini's petition for cancellation was barred by laches. In a decision dated May 1, 2008, the TTAB ruled in Houdini's favor on all issues, granted Houdini's petition for cancellation and ordered cancellation of Metrokane's registration for HOUDINI.

4. On May 9, 2008, Houdini commenced a civil action against Metrokane in the United States District Court for the Central District of California, Civil Action No. CV08-03076

PA (FMOx) asserting claims for trademark infringement and unfair competition based on Metrokane's use of the HOUDINI trademark. Houdini seeks an award of damages as well as injunctive relief. The complaint was served on Metrokane on May 13, 2008. A true copy of the Complaint is attached hereto as Exhibit A.

5. After requesting and receiving Houdini's stipulation to a couple of extensions of time to respond to the Complaint, Metrokane filed an Answer to the Complaint in the California action on June 25, 2008, in which it largely denied Houdini's claim and asserted affirmative defenses of priority of use, likelihood of confusion and laches. Metrokane did not assert any counterclaims. A true copy of the Answer is attached hereto as Exhibit B.

6. The main fact issues in the California action are which party had priority of use of the HOUDINI trademark, whether there is a likelihood of confusion caused by Metrokane's use of the mark vis-à-vis Houdini's use of the mark, and whether Houdini's claims are barred by laches.

7. On July 7, 2008, Houdini filed a Motion for a Preliminary Injunction in the California case. The case has been fully briefed and the Court has taken the Motion under submission. True copies of Houdini's memorandum in support of the Motion, Metrokane's opposition to the Motion, and Houdini's reply brief are attached hereto as Exhibits C, D, and E, respectively.

Sworn to under the penalty of perjury this 31st day of July, 2008 in Pasadena, California.

s/ Edward R. Schwartz
Edward R. Schwartz